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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

[Docket No. APHIS-2013-0021]

RIN 0579-AD77

User Fees for Agricultural Quarantine and Inspection Services

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interpretative rule and request for comments.

SUMMARY: On May 13, 2016, the Air Transport Association of America filed suit against the Animal and Plant Health Inspection Service (APHIS), claiming APHIS' 2015 final rule setting fee structures for its Agricultural Quarantine Inspection (AQI) program (Docket No. APHIS-2013-0021, effective December 28, 2015) violated the Administrative Procedure Act. In its March 28, 2018 Order, the U.S District Court for the District of Columbia rejected challenges based on the calculations and methods for setting the fees and APHIS' adoption of the final rule. However, the Court also held that APHIS improperly relied on an expired provision in the relevant statute to justify its ability to levy a fee to support a reserve account. In so doing, the Court did "not evaluate or rule on the agency's current argument that it has authority to fund a reserve" pursuant to other statutory authority. In this clarification to the final rule, APHIS clarifies that, while we accept the court's holding that congressional authority under one specific provision of the statute to maintain a reasonable balance in the reserve account expired in 2002, this expiration does not abrogate our authority to collect for a reserve, as that authorization is

written into other provisions of the statute. This interpretation is consistent with APHIS' long-standing precedent as set forth in prior rulemakings. The agency is only seeking comments related to the legal authority for the reserve component of AQI User Fee Program and is not reexamining any other aspect of the program at this time, including the AQI User Fee calculation.

DATES: The interpretive rule is issued [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. We will consider all comments that we receive on or before [Insert date 30 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0021>.
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2013-0021, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Any comments we receive may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0021> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. George Balady, AQI User Fee Coordinator, Office of the Executive Director-Policy Management, PPQ, APHIS, 4700 River Road Unit 131, Riverdale, MD 20737 1231; (301) 851-2338; Email: AQI.User.Fees@aphis.usda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 13, 2016, the Air Transport Association of America filed suit against the Animal and Plant Health Inspection Service (APHIS), claiming APHIS' 2015, final rule (80 FR 66748-66779, Docket No. APHIS-2013-0021, effective December 28, 2015) setting fee structures for its Agricultural Quarantine Inspection (AQI) program violated the Administrative Procedure Act. In its March 28, 2018, Order, the U.S. District Court for the District of Columbia affirmed APHIS' cost methodology and the sufficiency of its data. The Court remanded to APHIS the reserve portion of the final rule updating user fees for the AQI program. The Court expressly did not vacate the rule pending further explanation by the agency. *See Air Transport Ass'n of Am. v. U.S. Dep't of Agric.*, 317 F. Supp. 3d 385, 392 (D.D.C. 2018).

In its memorandum opinion accompanying that order, the Court stated that the agency unreasonably relied on the "reasonable balance" allowance in 21 U.S.C. 136a(a)(1)(C) of the Food, Agriculture, Conservation, and Trade (FACT) Act of 1990, 21 U.S.C. 136a, to justify its continued fee collection to maintain a reserve, as that allowance expired after fiscal year 2002. The Court did not rule on whether APHIS had authority for continued fee collection to maintain a reserve under any other subsection of the FACT Act and, therefore, remanded to the Agency for "reconsideration of its authority to charge a surcharge for the reserve account." *See Air Transport Ass'n*, 303 F. Supp. 3d at 57. The Court expressly declined to consider APHIS' explanation in its legal filings that, consistent with its past explanations and practice, APHIS justified its authority to collect such fees under other of subsections of 21 U.S.C. 136a(a)(1). *Air Transport Ass'n of Am., Inc.* 303 F. Supp. 3d at 51; *see, e.g.*, User Fees for Agricultural Quarantine & Inspection Services, 71 FR 49984 (August 24, 2006). The Court did "not evaluate

or rule on the agency's . . . argument that it had authority to fund a reserve under" a different part of the statute, and instead remanded the rule to the agency without vacating for further consideration of the agency's authority. *Id.* In this clarification to the final rule, APHIS restates its longstanding practice and authority under 21 U.S.C. 136a(a)(1)(A) and (B) provide for its continued collection of user fees to maintain a reserve in the AQI User Fee Account.

II. Clarification of Authority

A. The Rulemaking at Issue

The FACT Act authorizes APHIS to collect user fees to fully fund its AQI Program. These user fees must be sufficient to cover the costs of:

- Providing AQI services to commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international passengers in connection with the arrival, at a port in the customs territory of the United States (21 U.S.C. 136a(a)(1)(A));
- Providing preclearance or preinspection at a site outside the customs territory of the United States to international passengers, commercial vessels, commercial trucks, commercial railroad cars, and commercial aircraft (21 U.S.C. 136a(a)(1)(A)); and
- Administering the AQI Program (21 U.S.C. 136a(a)(1)(B)).

In the April 25, 2014, *Federal Register* (79 FR 22895), we issued a proposal to update the methodology by which APHIS would calculate user fees across user fee classes. Such a change was necessary to address historic underfunding for the AQI Program and to create a system whereby future adjustments to the user fee schedule could be easily made to more accurately reflect actual costs. In the 2015 final rule (80 FR 66748), we applied an activity-based-costing methodology to determine the appropriate user fee for each user fee group in a

manner that accurately reflects individual user fee costs and protects users against cross-subsidization across user fee groups.

The 2014 proposed rule cited APHIS's authority to maintain a "reasonable reserve," without specifically articulating which subsection of the FACT Act granted it authority to do so; however, the 2015 final rule used the phrase "reasonable balance." While not explicitly citing 21 U.S.C. 136a(a)(1)(C) to justify continued collection with respect to the AQI Reserve, APHIS acknowledges the unexplained change in nomenclature could lead to an interpretation of the rule to mean that APHIS was, in fact, relying on that subsection, which states that the Secretary of Agriculture may prescribe and collect fees sufficient, "through fiscal year 2002, to *maintain a reasonable balance* in the Agricultural Quarantine Inspection User Fee Account established under paragraph (5)" 21 U.S.C. 136a(a)(1)(C) (emphasis added).

B. Further Clarification of APHIS' Authority to Maintain a Reserve in Response to the Court's Orders

In light of the Court's remand, and after further review, APHIS is clarifying that subsections 136a(a)(1)(A) and (B) of the FACT Act provide adequate authority to continue setting user fees in amounts to maintain the AQI Reserve. This conclusion is consistent with APHIS' longstanding practice, which has been explained to the public through multiple rulemaking proceedings, beginning in 2002.

In a November 16, 1999, final rule, APHIS amended the regulations but inadvertently indicated that the fees would only remain in effect through September 30, 2002. *See* 64 FR 62089. To remedy the oversight, APHIS published an interim rule and request for comments on September 3, 2002. *See* 67 FR 56217. In this interim rule, APHIS stated that its authority to maintain a reasonable balance expired on September 30, 2002. *See id.* Still, APHIS reiterated

that it had authority to collect user fees for “providing AQI services *in connection* with the arrival at a port in the customs territory of the United States” and for “*administering* the user fee program[.]” *Id.* (emphasis added). APHIS stated further that, “[t]his interim rule will extend *existing* user fee rates and continue to allow the collection of the fees beyond September 30, 2002. Collection of these fees is necessary for the continuance of specific border inspection activities that are essential to protect U.S. agriculture from plant and animal disease and pest threats.” *Id.* (emphasis added). The existing fees included the cost of maintaining the reserve, which was in place at this time. *Id.* On January 24, 2003, this interim rule became final without revision after no comments were received.

On December 9, 2004, APHIS revised its user fee regulations in another interim rule and request for comments. *See* 69 FR 71660. In this rule, APHIS did not mention its ability to maintain a reasonable reserve balance in its background section; however, it did state that the Act gives it the authority to collect user fees for “providing AQI services *in connection* with the arrival at a port in the customs territory of the United States” and for “*administering* the user fee program[.]” *Id.* (emphasis added). To explain its rationale for wanting a reserve balance equal to 25 percent of annual operating costs for APHIS and CBP AQI activities in the AQI account, APHIS stated:

The reserve fund provides us with a means to ensure the continuity of AQI services in cases of fluctuations in activity volumes, bad debt, carrier insolvency, or other unforeseen events, such as those of September 11, 2001, which, as noted earlier, resulted in substantial cost increases for the AQI programs and lower-than-anticipated revenues. Maintaining an adequate reserve fund is, therefore, essential for the AQI program.

Id. at 71664.

In the final rule, published August 24, 2006, APHIS responded (71 FR 49985) to comments regarding the need to maintain a 25 percent reserve fund. In our response, we

explained that a 25 percent reserve is needed to ensure continuity of AQI services in cases of fluctuations in activity volumes. Without this reserve, a significant drop in international passenger travel, such as occurred post 9/11, would be catastrophic to the program. Full-time personnel would have to be furloughed and services would have to be reduced. As travel volumes returned to normal, the AQI program would need to recruit, replace, and/or rehire the furloughed employees. This disruptive and costly process would increase the cost of AQI services and, consequently, necessitate higher user fees going forward. Moreover, during this time, there would be a drastically increased risk of the introduction of harmful plant pests in the United States. Conversely, the 25 percent reserve also allows for growth in the AQI program should APHIS find it necessary to supplement inspection services due to, for example, a sudden increase in demand.

Finally, a 25 percent reserve is needed to account for the lag in AQI user fee collections. Payments are made into AQI user fee accounts for commercial aircraft and international airline passengers on a quarterly basis, with monies not remitted to APHIS until 1 month after the end of the quarter in which they were collected. Since the fourth quarter fees are not due, and therefore not received, until after the fiscal year is over, we are not able to use those funds to pay for providing AQI services for commercial airlines and international air passengers in the fiscal year in which they are earned.

So, while not explicitly stated, APHIS had ceased relying on 21 U.S.C. 136a(1)(C) to justify its collection for the reserve in favor of reliance on sections (1)(A) and (1)(B). That same reasoning holds true today.

Title 21 U.S.C. 136a(a)(1)(A) permits the Secretary of Agriculture to prescribe and collect fees sufficient to “cover the cost of providing agricultural quarantine and inspection

services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or preinspection at a site outside the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car” (emphasis added). Title 21 U.S.C. 136a(a)(1)(B), extends this authority to “cover the cost of administering” the AQI Program as well. As noted in both the 2014 proposed rule and the 2015 final rule, APHIS sets fees based on Federal guidance found in Office of Management and Budget Circular A-25 and Federal Accounting Standards Advisory Board Statement of Accounting Standards Number 4, which states that fees shall recover the full cost incurred by the government.

Congress has been made expressly aware of the fact that the agency has been setting fees at a level to maintain a reasonable balance in the account since at least FY 2002. Each year since FY 2002, Congress asked APHIS to submit information on AQI user fee collections, including the balance in the reserve, and each year, APHIS has advised that its collections have resulted in a positive reserve balance. Additionally, on several occasions, the U.S. Government Accountability Office (GAO) has reported to Congress on APHIS’ maintenance of the reserve. *See* GAO, Federal User Fees: A Design Guide, GAO-08-386SP (May 2008) noting that “the AQI fee statute gives APHIS permanent authority to use the collected fees and APHIS maintains a reserve in case of emergency”; GAO, Agricultural Quarantine Inspection Fees: Major Changes Needed to Align Fee Revenues with Program Costs, GAO-13-268 (March 2013) discussing maintenance of AQI reserve; GAO, Federal User Fees: Fee Design Options and Implications for Managing Revenue Instability, GAO-13-820 (September 2013) discussing same; GAO, Federal User Fees: Key Considerations for Designing and Implementing Regulatory Fees, GAO-15-718 (September 2015) discussing same.

APHIS has consistently explained in past rules that the reserve fund provides “a means to ensure the continuity of AQI services in cases of fluctuations in activity volumes, bad debt, carrier insolvency, or other unforeseen events, such as those of September 11, 2001, which . . . resulted in substantial cost increases for AQI programs and lower-than-anticipated revenues.” *See, e.g.*, 69 FR 71660-71664. At various times since AQI user fees were established, as a result of service demands, APHIS has had to rely on the AQI reserve fund to maintain its operations, nearly draining the reserve on at least one occasion. *See* 64 FR 62090. In December 2004, APHIS reported in an interim rulemaking that it was close to running out of money altogether. *See* 69 FR 71661. The reserve fund allows the program to ensure the continuity of services even under these service constraints, and therefore constitutes a cost of providing the services, as permitted by subsection 136a(a)(1)(A).

Even when user fees are set at a level that keeps pace with current costs, the 3-month temporal lag between the end of the fiscal year and the conclusion of the calendar year inherently results in a significant delay in fee remittances. *See* 64 FR 43106. Because of cash management issues inherent in the program, the bulk of users remit their payments on a quarterly basis “with monies not remitted to APHIS until 1 month after the end of the quarter in which they were collected,” which is long after APHIS and U.S. Customs and Border Protection (CBP) have performed their necessary services in connection with the AQI program. *See* 71 FR 49984. This remittance process was developed to offset some of the burden on the users for collecting fees on the government’s behalf, such as with the airline passenger fee, by allowing them to retain any interest paid on collections they hold in trust. Collecting fees to cover these costs required to run the AQI program, which may go over and beyond the specific operational costs of a particular

inspection but nonetheless fall within the scope of operating the program, reasonably constitutes “the costs of administering this subsection” within the meaning of 21 U.S.C. 136a(a)(1)(B).

Because Congress has not provided specific guidance to APHIS on how to interpret 21 U.S.C. 136a(a)(1)(A) and (B), we construe these sections as providing authority to continue funding a reserve in order to ensure continuity of services as well as to protect the program from instability resulting from funding flow uncertainty, bad debt, and non-recurring financial obligations. Section (1)(A) provides congressional authority to set and collect fees to cover the cost of providing AQI services “in connection” with the arrival at a port in the customs territory of the United States. *See* 21 U.S.C. § 136a(1)(A). Certain costs, such as upgrading facilities and replacing broken equipment, are not reoccurring costs and are therefore impossible to account for as line items in the court-approved ABC methodology for setting user fees. These onetime costs are still incurred “in connection” with the AQI program and must be factored into the overall user fees, as the statute demands full cost recovery. As such, there is no way to fund these obligations other than by accessing the AQI reserve.

Additionally, section (1)(B) demands that APHIS “cover the cost of administering [the AQI program].” *See* 21 U.S.C. 136a(a)(1)(B). As stated above, there is a significant temporal lag between the rendering of services by APHIS and CBP and the collection of fees to cover these services. Sometimes, fees are not collected at all even though the services have already been performed. For instance, bad debt may result from a commercial airline filing for bankruptcy. *See* 71 FR 49985. Administratively, if a bad debt arises, the Act requires APHIS to cover it since the services have already been performed and the costs have already been incurred. Therefore, a reserve is essential to prevent the AQI program from running a deficit, which could result in personnel furloughs or interruptions in service. Such interruptions would significantly

increase the risk that the United States could be exposed to animal and plant pests from foreign countries.

The Court affirmed APHIS' cost methodology and the sufficiency of its data, and expressly did not vacate any portion of the existing rule. This interpretative rule relates only to the legal authority for the reserve component of the AQI User Fee Program. The final rule, which took effect in 2015, 80 FR 66748, remains in force, *Air Transport Ass'n*, 317 F. Supp. 3d at 392. Accordingly, this interpretive rule does not affect, inter alia, the user fee calculation with respect to the AQI Reserve.

Authority: 7 U.S.C. 7701-7772, 7781-7786, and 8301-8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 22nd day of April 2019 .

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.
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